



Appellant-defendant Frank Brian Wicks appeals his conviction for Attempted Murder,<sup>1</sup> a Class A felony. Specifically, he argues that there was insufficient evidence to support a finding of guilt. In addition, he maintains that the trial court abused its discretion when it refused to instruct the jury on lesser included offenses and when it found that the circumstances warranted an enhanced sentence.

### FACTS<sup>2</sup>

The facts most favorable to the judgment reveal that on May 24, 1998, Freddie Mills sold Frank Wicks fake crack cocaine for \$50. After discovering that the substance he had bought was not crack cocaine, Wicks informed a relative of Mills that if “[Mills] didn’t pay him, he was going to kill [Mills].” Record at 397. Later that evening, both men were present at a party, where Wicks demanded his money back from Mills. Mills’ sister attempted to give Wicks \$50, but Wicks remained angry and followed Mills, who left the party with a friend and walked home. While following Mills, Wicks attempted to engage Mills in an argument, but Mills refused to participate. As Mills ascended the front steps of his home, Wicks shot him in the leg, in the arm, in the shoulder, and again in the leg. Mills collapsed on the porch, calling for someone to unlock the door to his home. Wicks then held the gun to Mills’ forehead and pulled the trigger. However, the gun did not fire. The door to Mills’ home was opened by someone inside, and Wicks subsequently fled.

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<sup>1</sup> IND. CODE § 35-41-5-1; IND. CODE § 35-42-1-1.

<sup>2</sup> Oral argument was heard in this case on March 30, 2000 at Saint-Mary-of-the-Woods College.

The State charged Wicks with attempted murder of Mills and of another person present at Mills' home when the shooting occurred. Following a jury trial on September 28, 1998, the jury acquitted Wicks of the second charge but was unable to reach a verdict on the charge of attempted murder of Mills. Following a retrial which commenced on January 6, 1999, Wicks was convicted of attempted murder of Mills. At a sentencing hearing on February 1, 1999, the court sentenced Wicks to an enhanced sentence of forty years upon finding that the aggravating factors, including use of a firearm and the victim's being shot multiple times, outweighed the mitigating factor that Wicks' six-month-old child would be deprived of his support. Wicks now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence

Wicks first argues that the evidence is insufficient to support a finding of guilt. Specifically, he argues that the evidence was insufficient to identify him as the person who shot Mills. He points to inconsistencies in testimony such as the fact that two different names were used to identify the shooter, and the fact that the shooter was identified as a "brother" by the victim, while the victim denied at trial that he considered Wicks a "brother." R. at 327.

When reviewing a claim of insufficiency of the evidence, we neither reweigh the evidence nor judge the credibility of witnesses. Johnson v. State, 721 N.E.2d 327, 331 (Ind. Ct. App. 1999), trans. denied. Rather, we examine only the evidence most favorable to the State, along with all reasonable inferences to be drawn therefrom, and if there is substantial evidence of probative value to sustain the conviction, it will not be set

aside. Id. Furthermore, testimony from the victim alone is sufficient to sustain a conviction. Warren v. State, 701 N.E.2d 902, 906 (Ind. Ct. App. 1998), trans. denied.

A person commits attempted murder when he knowingly or intentionally engages in conduct that constitutes a substantial step toward killing another human being. I.C. §§ 35-41-5-1, 35-42-1-1. Intent is a mental state which the trier of fact must often infer from the surrounding circumstances. Duren v. State, 720 N.E.2d 1198, 1202 (Ind. Ct. App. 1999), trans. denied. Firing a gun in the direction of another person is sufficient evidence to support the inference that the defendant acted with intent to kill. Wilson v. State, 697 N.E.2d 466, 476 (Ind. 1998).

In this instance, there is evidence that Wicks shot Mills several times as Mills attempted to go into his own home. R. at 300-04. After Mills collapsed, Wicks placed a gun to Mills' forehead and pulled the trigger. R. at 303-04. Another witness testified that Wicks shot Mills. R. at 197-99. Under our standard of review, it is difficult to find that all of the above amounts to insufficient evidence to convict for attempted murder.

## II. Refusal of Tendered Jury Instructions

Wicks next argues that the trial court abused its discretion in refusing to give jury instructions which he had tendered and which addressed lesser included offenses. Specifically, he maintains that instructions regarding Aggravated Battery,<sup>3</sup> Battery,<sup>4</sup> and

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<sup>3</sup> I.C. § 35-42-2-1.5.

<sup>4</sup> I.C. § 35-42-2-1.

Pointing a Firearm<sup>5</sup> were all lesser included offenses for which instructions should have been given.

In analyzing whether a court should accept a party's instruction on lesser included offenses, the trial court must first decide whether the lesser included offense is either inherently or factually included within the crime charged. Young v. State, 699 N.E.2d 252, 255 (Ind. 1998). If the lesser offense is inherently or factually included, the trial judge must consider whether the evidence provided by both parties creates a serious evidentiary dispute regarding the element or elements which distinguish the greater from the lesser offense. Id. When a trial court refuses an instruction on grounds that a serious evidentiary dispute does not exist, we will reverse only when there is an abuse of discretion. Id. However, where it is not apparent that the instruction was refused on that basis, we will review the trial court's decision de novo. Id.

The State points out that, because the record does not contain the basis for the trial court's refusal of the tendered jury instructions, we cannot determine the applicable standard of review. For this reason, the State contends that Wicks has waived appellate review. See Jones v. State, 695 N.E.2d 1041, 1041 (Ind. Ct. App. 1998).

However, even reviewing the trial court's decision de novo, we can only conclude that the trial court did not err. Wicks stated that he planned to kill Mills if he did not get his money back. R. at 189, 397. Wicks shot Mills at close range more than once. R. 300-02. When Mills had collapsed on the porch of his home, Wicks held the gun to his

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<sup>5</sup> IND. CODE § 35-47-4-3.

head and pulled the trigger. R. at 303-04. It was only because the gun did not fire that Mills was saved from being killed. Our supreme court has found that, where there is no serious evidentiary dispute about whether the lesser of two offenses was committed rather than the greater, the trial court should not give the lesser included offense instruction because it would improperly encourage a compromise verdict. Wright v. State, 690 N.E.2d 1098, 1108 (Ind. 1997). In this instance, the jury could not have concluded that the lesser offense was committed and not the greater. Therefore, the trial court properly refused to give the instructions regarding lesser included offenses. See id.

Also persuasive is the fact that Wicks did not argue he had no intent to kill Mills. Instead, he argues that the identification evidence is insufficient to convict him. Therefore, Wicks himself presents no serious evidentiary dispute regarding intent to kill. Under these circumstances, we must affirm the trial court's refusal to tender instructions on lesser included offenses.

### III. Enhancement of Sentence

Finally, Wicks asserts that the trial court abused its discretion in failing to properly outline its reasons for the sentence enhancement which it imposed. Specifically, he argues that the trial court merely "glossed over" the single mitigating factor it considered, which he suggests is tantamount to the court's impermissibly ignoring clearly supported mitigating evidence. Appellant's brief at 16.

The trial court's assessment of the weight of the aggravating and mitigating factors and the appropriateness of the sentence is entitled to great deference and will be set aside only upon a showing of manifest abuse of that discretion. Thacker v. State, 709 N.E.2d

3, 10 (Ind. 1999). The trial court's discretion includes the right to enhance a presumptive sentence. Workman v. State, 716 N.E.2d 445, 449 (Ind. 1999). Just one valid aggravating factor is necessary to sustain an enhanced sentence. Simmons v. State, 717 N.E.2d 635, 641 (Ind. Ct. App. 1999). The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. Allen v. State, 720 N.E.2d 707, 715 (Ind. 1999) (citing Hurt v. State, 657 N.E.2d 112, 114 (Ind. 1995)).

In imposing an enhanced sentence a trial court must identify all significant mitigating and aggravating circumstances, state the specific reasons why each circumstance is considered to be mitigating or aggravating, and balance the mitigating and aggravating circumstances in order to determine whether the aggravating circumstances offset the mitigating circumstances. Ford v. State, 718 N.E.2d 1104, 1106 (Ind. 1999). Where the record indicates that the trial court engaged in the evaluative processes and the sentence imposed was not manifestly unreasonable, then the purposes underlying the specificity requirements are satisfied and reversal is not required. Wright v. State, 665 N.E.2d 2, 6 (Ind. Ct. App. 1996).

In this instance, the trial court identified all significant aggravating and mitigating factors. As aggravators, the court cited Wicks' previous convictions for disorderly conduct and visiting a common nuisance, the fact that Wicks had used a firearm in this offense, and the fact that Wicks had shot the victim multiple times. R. at 159. We need not consider whether the trial court erred in considering use of a firearm as an aggravator when use of a firearm was part of the charging information because there were other valid aggravating factors which supported an enhanced sentence. See Simmons, 717

N.E.2d at 641. With respect to mitigators, the trial court recognized Wicks' wish to support and care for his infant daughter. R. at 160. The trial court then found that the aggravators clearly outweighed the mitigator. R. at 160. Thus, the trial court did what was necessary to demonstrate that it engaged in an evaluative process. See Wright, 665 N.E.2d at 6. We conclude that the sentence was proper and Wicks has failed to demonstrate that it was manifestly unreasonable.

Judgment affirmed.

NAJAM, J., and BAILEY, J., concur.